

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2735

Cir. Ct. No. 2009CV738

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BJK OF MANITOWOC COUNTY, INC. D/B/A BARTOW BUILDERS,

PLAINTIFF-RESPONDENT,

V.

TRACY RUPKE AND DAVID BARKWELL,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

V.

BRANDON G. BARTOW,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In this breach-of-contract case, Tracy Rupke and David Barkwell (the Barkwells)¹ appeal a judgment in favor of BJK Builders of Manitowoc, Inc., d/b/a Bartow Builders, and its owner Brandon Bartow (collectively, Bartow). Bartow illegally performed some of its contractual duties. The Barkwells contend that Bartow therefore forfeited its right to recover and that the trial court erred in its assessment of damages. We disagree and affirm.

¶2 The trial court made the following findings of fact. In May 2008, the Barkwells and Bartow entered into a \$532,652.85 remodeling agreement to extensively renovate the Barkwells' large, historic home. Scores of change orders were generated throughout the process. Few were approved in strict compliance with contract requirements that both homeowners sign for a change order to be activated and that change orders be signed before the work was done or products ordered. David often was present at the site and was consulted before virtually all of the change-order work was done.²

¶3 The change orders necessarily led to delays, changing the completion date from September 26 to October 30, 2008. The Barkwells moved in on October 26. By this time, the parties' relationship had deteriorated: on the Barkwells' side over Bartow's handling of construction funds and unilateral decision making; on Bartow's side over the Barkwells' changes in "allowance"

¹ Barkwell and Rupke are husband and wife. We follow their lead in using the collective name "the Barkwells." Where speaking of them individually, we will use "David" and "Tracy."

² Tracy, an orthopedic surgeon, was completing a fellowship in Seattle during much of the renovation.

items or in the scope of the work, causing delays and greater expense, then refusing to pay amounts due under the contract.

¶4 Bartow filed suit alleging that the Barkwells breached the contract and still owed \$32,543.60, leaving subcontractors unpaid.³ The Barkwells counterclaimed, alleging that the contract was unenforceable due to ATCP 110 violations, unfair billing law violations, *see* WIS. STAT. § 100.195 (2011-12),⁴ and theft by contractor, *see* WIS. STAT. § 779.02(5), and alleging that Bartow breached the contract by failing to satisfactorily complete the work. They also sought a declaration that Bartow's illegal acts barred recovery on its contract claim.

¶5 After a three-day bench trial, the trial court concluded that Bartow committed theft by contractor and some ATCP violations but that Bartow's acts were insufficient to warrant voiding the contract. Also concluding that the Barkwells had not proved their damages, the court dismissed their counterclaims. It granted Bartow judgment on its breach-of-contract claim for \$14,290.54, plus attorney fees and costs of \$21,381.71. The Barkwells appeal.

¶6 The Barkwells again argue that the contract is unenforceable because of the ATCP and statutory violations. They also assert that their counterclaims were wrongly dismissed.⁵ We disagree.

³ Without consulting Bartow, the Barkwells settled with subcontractors who filed lien notices. The contract forbade such negotiations, as it reduced Bartow's profit.

⁴ All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

⁵ The Barkwells abandon their breach-of-contract and unfair-billing claims on appeal.

¶7 Contractual provisions agreed to by competent parties generally are valid and enforceable unless they violate statute or public policy. *Abbott v. Marker*, 2006 WI App 174, ¶6, 295 Wis. 2d 636, 722 N.W.2d 162. “Where the material facts are undisputed, the existence of a valid, enforceable contract is a question of law, which we review de novo.” *Rosecky v. Schissel*, 2013 WI 66, ¶28, 349 Wis. 2d 84, 833 N.W.2d 634.

¶8 True, the trial court concluded that Bartow violated WIS. ADMIN. CODE §§ ATCP 110.05(1), 110.02(10) and 110.02(11) by, respectively, performing work and then requesting payment under unsigned change orders, using “a sizeable portion” of the Barkwells’ initial \$50,000 down payment for other jobs,⁶ and soliciting a false invoice from a subcontractor to avoid a payment dispute with the Barkwells. The Barkwells cite no authority, however, for the proposition that such violations void the entire contract. Indeed, it is “grave error” to assert that a contract in violation of a statute or a regulation promulgated under WIS. STAT. § 100.20 necessarily is unenforceable. See *Baierl v. McTaggart*, 2001WI 107, ¶19, 245 Wis. 2d 632, 629 N.W.2d 277 (citation omitted).

¶9 The trial court concluded that the Barkwells owed money for work completed or products ordered pursuant to signed change orders, even if signed only by David, because a written contract may be modified by subsequent unequivocal conduct of the parties. See *Nelsen v. Farmers Mut. Auto. Ins. Co.*, 4 Wis. 2d 36, 56, 90 N.W.2d 123 (1958). One party to a contract cannot alter its terms without the assent of the other, however. *Id.* at 55. Therefore, the court

⁶ The trial court concluded that the misappropriation of funds under WIS. ADMIN. CODE § ATCP 110.02(10) established the theft-by-contractor claim under WIS. STAT. § 779.02(5).

held that unsigned change orders did not modify the parties' agreement and so were unenforceable, such that it was the Barkwells' choice, not obligation, to pay the subcontractors directly to settle unsigned change orders.

¶10 A person suffering pecuniary loss because of a violation of WIS. STAT. § 100.20 or who prevails on a theft-by-contractor claim may seek damages. *See* §§ 100.20(5), 779.02(5) and 895.446(3). Of course, the person must show both a causal connection between the violation or illegality and the damages alleged and the amount of damages to a reasonable certainty. The Barkwells were unable to do either.

¶11 Our review of a damage award is highly deferential. *D.L. Anderson's Lakeside Leisure Co. v. Anderson*, 2008 WI 126, ¶26, 314 Wis. 2d 560, 757 N.W.2d 803. We affirm if there is any credible evidence which, under any reasonable view, supports the finding. *Id.*

¶12 The trial court found that the final approved contract price (base plus signed change orders) was \$599,380.45 and that the Barkwells' payments totaled \$568,010.72, including the \$7,479.01 in payments they made directly to subcontractors, leaving an unpaid balance of \$14,290.54. Credible evidence supports that finding.

¶13 The court also concluded that the Barkwells did not prove pecuniary loss. It found that payments arising out of unsigned work orders could not be characterized as damages because they chose to make them, that they paid sums they disagreed with rather than disputing the lien claim, that negotiating a lower price did not relieve them of the obligation to honor the contractual price, and that their decision to move in early showed that they regarded the agreement to be substantially complete. Credible evidence also supports those findings.

¶14 Both parties sought attorney fees. We review the trial court's determination of attorney fees for an erroneous exercise of discretion. *See Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). Despite proving some elements of their counterclaims, the Barkwells neither proved pecuniary loss on the ATCP claim nor prevailed on the theft-by-contractor claim. The court therefore properly denied their claim for attorney fees. *See* WIS. STAT. §§ 100.20(5), 895.446(3)(b). It also properly awarded Bartow attorney fees and costs attributable to the extent that it prevailed on its breach-of-contract claim.

¶15 The trial court produced a written decision of impressive clarity and thoroughness. We agree with its analysis and conclusions in every respect.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

